No. 85-286

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK BEARY,

Petitioner,

– against –

WEST PUBLISHING COMPANY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	2
Summary of Argument	2
Argument	2
1. The Second Circuit's Decision Conforms With Present-Day New York Law And Therefore May Not Be Disturbed	2
2. This Was A Proper Case For An Award Of Damages Under Rule 38, F. R. App. Proc. 38	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	Page
Beary v. West Publishing Co., 763 F.2d 66 (2d Cir. 1985)	2
Crumpacker v. Indiana Supreme Court Disciplinary Commission, ____ U.S. ____, 105 S. Ct. 1829 (1985)	5
Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), *aff'd.*, 297 F.2d 526 (2d Cir. 1962), *cert. denied*, 369 U.S. 871 (1962)	5
Gurda v. Orange County Publications Division of Ottaway Newspapers, Inc., 81 A.D.2d 120, 439 N.Y.S.2d 417 (2d Dept. 1981)	3, 4
Holy Spirit Association for Unification of World Christianity v. New York Times Co., 49 N.Y.2d 63, 424 N.Y.S.2d 165 (1979)	3, 4
Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976)	5
Murray v. Brancato, 290 N.Y. 52, 48 N.E. 2d 257 (1943)	3, 4
Nemerover v. Held, 54 A.D.2d 561, 387 N.Y.S. 2d 14 (2d Dept. 1976)	3
Park Avenue Investment & Development Inc. v. Barkheimer, ____ U.S. ____, 105 S. Ct. 2171 (1985)	5
Talamini v. Allstate Insurance Co., ____ U.S. ____, 105 S. Ct. 1824 (1985)	5

	Page
Statutes:	
Fed. R. App. Proc. 38	5
Sup. Ct. R. 49.2	5
N.Y. Civ. Rights Law § 74 (McKinney 1976)	2, 3, 4
N.Y. Jud. Law § 432 (McKinney 1983)	4

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent West Publishing Company respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case reported at 763 F.2d 66 (2d Cir. 1985).

STATEMENT OF THE CASE

This frivolous petition stems from a New York Civil Court opinion that held petitioner Patrick Beary not liable to a roofing contractor for the sum of $656. Petitioner liked the court's result but not its opinion, which he claims defamed him. He therefore brought this $5,000,000 diversity action against respondent West Publishing Company for the "libel" of publishing the opinion in its advance sheet. The Court of Appeals for the Second Circuit affirmed the dismissal of petitioner's suit because New York Civil Rights Law Section 74 bars the maintenance of a civil action against any person "for the publication of a fair and true report of a judicial proceeding." N.Y. Civ. Rights Law § 74 (McKinney 1976). The Second Circuit also directed petitioner to pay double costs and $1,000 to respondent West pursuant to Rule 38 of the Federal Rules of Appellate Procedure "[i]n view of the complete frivolousness of this appeal." (A8).

The opinion of the Second Circuit below contains a full statement of the facts of this case (A2-A4), which therefore will not be repeated here.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Second Circuit correctly applied New York Civil Rights Law Section § 74 which bestows an absolute privilege upon any person who publishes a fair and true report of any judicial proceeding.

Argument

1. The Second Circuit's Decision Conforms With Present-Day New York Law And Therefore May Not Be Disturbed.

The Second Circuit's ruling below was based on New York Civil Rights Law Section 74, which provides that:

> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

N.Y. Civ. Rights Law § 74 (McKinney 1976).

Present-day New York law is clear that Civil Rights Law Section 74 accords an absolute privilege to reports of proceedings which are true and fair, as was the West report of which petitioner complains. *Holy Spirit Association for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 424 N.Y.S.2d 165 (1979); *Gurda v. Orange County Publications Division of Ottaway Newspapers, Inc.*, 81 A.D.2d 120, 439 N.Y.S.2d 417 (2d Dept. 1981, opinion of Mollen, P.J. and Titone, J. concurring in part and dissenting in part), *rev'd for reasons stated in the opinion of Mollen, P.J. and Titone, J. below*, 56 N.Y.2d 705, 451 N.Y.S.2d 724 (1982); *Nemerover v. Held*, 54 A.D.2d 561, 387 N.Y.S.2d 14 (2d Dept. 1976) ("[D]efendants were absolutely privileged in publishing the transcript of the September 20, 1974 proceeding (see Civil Rights Law, § 74)").

Petitioner's complaint in this action was drawn to fit the contours of a 1943 decision of the New York Court of Appeals, *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943), which held that a New York State judge, though absolutely privileged when he writes an opinion or sends it to the State Reporter, has only a qualified privilege, defeasible upon proof of actual malice, when he sends the opinion to an "unofficial" reporter such as West. The 4-3 majority in *Murray v. Brancato* in *dicta* expressed doubt as to whether then-recent amendments to what is now Civil

Rights Law Section 74[1] had been intended to change the "common-law rule of liability where there is proof of 'actual malice,' " 290 N.Y. at 59, 48 N.E.2d at 260. In the 40 years which have intervened since *Murray v. Brancato* was decided, however, this question has been answered: the New York Court of Appeals has held that the privilege conferred by Section 74 is absolute and is not defeasible upon actual malice. *Holy Spirit Association* and *Gurda, supra*. Hence the Second Circuit and the District Court below were correct in concluding that, notwithstanding *Murray v. Brancato*, Section 74 bars petitioner's action.

Petitioner also contends that the absolute privilege by Civil Rights Section 74 is conditioned upon compliance with Section 432 of the New York Judiciary Law, which requires judges to send their opinions to the State Reporter, Petition for Certiorari 16. This is not the law at all; Section 74's privilege is rather conferred upon "any person" who publishes a judge's opinion, regardless of whether that person is an "unofficial" or an "official" reporter and regardless of whether the Judiciary Law was or wasn't complied with. Petitioner's allegation here that West received the opinion in question directly from the judge rather than from the State Reporter is baseless, but, even if it were true, the result in this case would have been the same.[2] Under Section 74 it is irrelevant how or from whom West received the opinion; all that matters is that West published the opinion as the judge wrote it which West did here.

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[1] Civil Rights Law § 74 in its original form (L. 1854, c. 130) provided that a newspaper publisher should not be liable for "a fair and true report in such newspaper of any judicial, legislative or other public official proceedings ...*except upon actual proof of malice* in making such report...." (emphasis added) The reference to actual malice was deleted from the statute in 1930, and in 1940 its scope was extended to protect "all persons" rather than merely newspaper publishers. L. 1930, c. 619; L. 1940, c. 561. The Court of Appeals in *Murray v. Brancato* did not pass upon whether the amendments had changed the statute's protection from the common-law qualified privilege to an absolute one because the statute had not been pleaded as a defense in that case.

[2] As the Second Circuit opinion reflects, West, in support of its motion for summary judgment, submitted the affidavit of its Vice President and Editor-in-Chief, Arnold O. Ginnow, which shows that West did receive the opinion from the State Reporter. *Beary v. West Publishing Co.* 763 F.2d 66, 69 (2d Cir. 1985).

Since the question presented by this case was purely one of New York law, there is no occasion for conflict among the Circuits concerning it and no conflict indeed exists. Petitioner cites *Lowenschuss v. West Publishing Co.*, 542 F.2d 180 (3d Cir. 1976) and *Garfield v. Palmieri*, 193 F. Supp. 137 (S.D.N.Y. 1961), *aff'd.*, 297 F.2d 526 (2d Cir. 1962), *cert. denied*, 369 U.S. 871 (1962). Both *Lowenschuss* and *Garfield* held West absolutely privileged as a matter of federal law in reporting federal decisions. Neither of these decisions conflicts with the Second Circuit's decision here that West also has an absolute privilege in reporting New York State opinions by reason of New York Civil Rights Law Section 74.

2. This Was A Proper Case For An Award Of Damages Under Rule 38 Fed. R. App. Proc. 38

As is evident from the Second Circuit's opinion below, petitioner's appeal to that court was patently frivolous. The modest sanctions imposed by that Court were well warranted to deter this sort of abuse of the appellate process, and were accordingly authorized by Fed. R. App. Proc. 38. *See also*, Sup. Ct. R. 49.2; *Talamini v. Allstate Insurance Co.*, ____ U.S. ____, 105 S. Ct. 1824 (1985) (Burger, C.J.)(costs should be imposed for dismissal of frivolous appeal and petition for certiorari); *Crumpacker v. Indiana Supreme Court Disciplinary Commission*, ____ U.S. ____, 105 S. Ct. 1829 (1985)(Burger, C.J.) (same); *Park Avenue Investment & Development, Inc. v. Barkheimer*, ____ U.S. ____, 105 S. Ct. 2171, (1985)(Burger, C.J.) (same).

CONCLUSION

For the foregoing reasons, Respondent West Publishing Company respectfully requests that the *petition for certiorari* be denied.

Dated: New York, New York
September 20, 1985

Respectfully submitted,
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